

HINSHAW

& CULBERTSON LLP

ATTORNEYS AT LAW

222 N. LaSalle, Suite 300
Chicago, IL 60601

T 312-704-3000
F 312-704-3001
www.hinshawlaw.com

November 30, 2016

VIA US MAIL AND E-FILING

Kurt A. Schroeder
Chief – Consumer Policy Division
Nancy Stevenson
Deputy Chief – Consumer Policy Division
Federal Communications Commission
Neelie Foosaner
Honors Attorney – Law Clerk
Consumer and Governmental Affairs
Bureau
445 12th Street, SW
Washington, DC 20554

**Re: Re: Notice of Ex Parte Presentation – In relation to Kohll's Pharmacy and
Homecare Inc.'s Petition for Declaratory Relief and Waiver, FCC No. 02-278**

Dear Counsel:

On November 28, 2016, I spoke on the telephone in relation to Kohll's *Petition for Declaratory Relief and Waiver* ("Petition"). To recap, as discussed in the Petition and my prior face-to-face meeting on August 30, 2016, the Petition is the result of a lawsuit filed in the Circuit Court of Cook County of Illinois by Ballard Nursing as a result of a one-time facsimile sent by Kohll's to Ballard Nursing and other entities on March 3, 2010. The facsimile discussed the need for employers to vaccinate their employees response to a H1-N1 flu outbreak. Kohll's prepared and sent facsimile in response to an informational packet that it received from the CDC which promoted the need vaccinate people (and employees) in response to a H1-N1 flu outbreak. For ease of reference, I have pasted a copy of the subject facsimile to the last page of this letter.

During our telephone call I discussed the following points:

- The court in the Circuit Court of Cook County denied Ballard's motion for summary judgment on the basis that Ballard's motion did not adequately demonstrate the transmission of the facsimiles in question. See attached order. Notably, the court order did not address the issues pending before you – whether the facsimile constitutes an advertisement and whether it is unconstitutional to not have health care exemptions for medical information transmitted via facsimile where a similar exemption exists for informational

based calls to cell phone calls. The court's order on this issue reads as follows: "The court notes that Kohll's has filed a petition before the Federal Communications Commission ("FCC") seeking a ruling that the Corporate Flu Fax was not an advertisement under the TCPA or, in the alternative, a waiver of the application of the TCPA to the Corporate Flu Fax." Accordingly, it appears that the court is deferring to your future decision.

- Based on the court's ruling, the parties are currently engaged in expert discovery which is focusing on whether the subject faxes were in fact successfully transmitted (and received as Khol's will also contend). Plaintiff has produced four expert reports and Khol's will engage in expert discovery and produce its own experts. As I explained, Khol's desired to know a possible time frame for a decision by you to possibly allow it to avoid the costs associated with expert discovery, a second summary judgment motion and/or trial.

- Kohll's has been unable to locate the informational packet sent by the CDC.

- It has recently come to my attention that West Georgia Veterinary Associates appears to have filed a "complaint" against Kohll's with the FCC sometime in 2005. I have searched the FCC's database to confirm whether this is the case and I have not found any such filing. I have also been assisted by someone at the FCC who manages the database and he was unable to find any such complaint. I'm still trying to track down the complaint through Kohll's former attorneys and will update you if I find it.¹

Thank you very much for taking the time to discuss my client's Petition. Should you have any questions, please feel free to contact me.

If you have any questions, please contact me.

Very truly yours,

x James C. Vlahakis

James C. Vlahakis

312-704-3715

jvlahakis@hinshawlaw.com

JCV:ran

cc: Mark Stone, Deputy Bureau Chief
Josh Zeldis, Deputy Chief - Consumer Policy Division
Nick Degani, Legal Advisor to Commissioner Ajit Pai

Enclosure: Summary Judgment Order dated September 6, 2016

¹ Please note that this letter was disclosed to me by Ballard's attorney after Ballard's expert found a reference to the complaint when Ballard's expert came across a letter written to Justin Kohll by Kohll's former attorneys. I do not represent Kohll's in the state court lawsuit, but it appears that the disclosure of the letter was inadvertent and Kohll's counsel in the state court case has asked Ballard's counsel (unsuccessfully) to return the recently s letter. I believe that motion practice may result over Ballard's counsel's refusal to return the privileged letter between Justin Kohll and Kohll's former attorneys.

3/3/10 15:25

402-408-2414

HR Exec

1/1

Corporate Flu Shots

Only \$16-\$20 per vaccination

Did you know....

10 employees sick from the flu costs you \$877.10

Each flu infection results in 3-5 missed work days and up to 2 weeks of low work productivity

How much is the flu REALLY costing your company?

Protect your assets! Vaccinate your employees.

Call for a free quote today

(877) 408-1990

www.MyWorkWellness.com

Providing corporate vaccinations for over 15 years

A division of Kohll's Pharmacy & Homecare...trusted since 1948

Removal From List Request

If you have received this information in error or if you are requesting that transmissions cease in the future, please notify the sender to be removed as the recipient of future transmissions. Notify the sender by sending a return transmission to (402) 896-7666, by calling (866) 500-7800, extension 154, or by sending an email to akurland@kohlls.com.
